Muhammad Hanif bin Ishak (a patient and this action is brought by his father, litigation representative, Ishak bin Hashim) v Mohammad Syazwan bin Mohamad Fuad & Anor

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO PA-12B-53–06 OF 2016
AZMI ABDULLAH JC
15 MARCH 2017

Damages (Personal Injury or Death) — Appeal — Appeal against awards made — Sessions court awarded injured party in road accident RM100,000 for severe head injury, RM28,000 for traumatic optic neuropathy, RM8,000 for scarring and RM96,000 for loss of earnings — Whether apart from increasing award for severe head injury to RM140,000 to commensurate with victim's condition at appeal hearing other awards by trial court were fair and reasonable and should not be disturbed — Whether courts trying accident cases should insist on strict proof where loss of earnings was claimed and not give in to sympathy and make unsubstantiated awards

The sessions court had awarded the appellant various amounts for general and special damages for pain and suffering, loss of earnings and nursing care in his suit against the respondents for damages arising from a road accident in which a motorcycle the appellant was riding collided into another motorcycle ridden by the first defendant. The instant appeal was only against the quantum awarded in respect of four items of damages: (a) RM100,000 for severe head injury; (b) RM28,000 for traumatic optic neuropathy; (c) RM8,000 for scarring; and (d) RM96,000 for loss of earnings.

Held, increasing the award for severe head injury to RM140,000 and affirming the other awards granted by the trial court:

(1) The award for severe head injury was increased to RM140,000 to commensurate with the plaintiff's present condition and relying upon the compendium of personal injury awards dated 17 April 2014. The court relied more on the defendant's specialist reports dated 19 June 2015 as they were made later than the plaintiff's reports and better indicated the current condition of the plaintiff. The court also made it a point to have a first-hand look at the plaintiff's current condition when the appeal was heard on 9 December 2016. The plaintiff had asked for a figure of RM400,000 but the court was of the view such a figure would be for situations where the plaintiff was quadriplegic and entirely bedridden which was not the case here (see paras 8–9).

(2) Based on the Revised Compendium of Personal Injury Awards dated 17 April 2014, the award for total blindness in one eye was RM80,000; hence the figure of RM80,000 asked for by the plaintiff for traumatic optic neuropathy was excessive. The sessions court's award for this head of damage, and also for scarring, was not manifestly or inordinately low; hence the said awards were not disturbed (see paras 11–12 & 15).

(3) The sessions court awarded the plaintiff RM500 per month on a multiplier of 16 years to give a total of RM96,000 for loss of earnings. On the facts, the award was most reasonable. It was not manifestly low as the claim was unsupported by any documentary evidence and corroboration by any witness with only the evidence of the plaintiff's father to rely upon. On the facts, it was highly unlikely the plaintiff was earning as evidenced during the hearing. The sessions court's award was therefore not disturbed. Claims such as this required strict proof. The magistrate's and sessions courts especially — where most accident matters were litigated — should warn themselves against being too lenient regarding claims involving earnings and should demand adequate documentary proof. The production of minimal evidence and purely oral evidence without any form of corroboration should not be easily entertained. It was the responsibility of the courts to ask parties to adhere closely to the strict-proof rule and the courts should not be too readily persuaded, especially by the element of sympathy, to give unsubstantiated awards for loss of earnings (see paras 19–21).

[Bahasa Malaysia summary

Mahkamah sesyen telah mengawardkan perayu pelbagai jumlah untuk ganti rugi am dan khas bagi kesakitan dan kesengsaraan, kehilangan pendatapan dan jagaan rawatan dalam guamannya terhadap responden-responden akibat kerosakan yang timbul daripada kemalangan jalan raya di mana motorsikal yang dibonceng oleh perayu telah berlanggar dengan motorsikal lain yang dipandu oleh defendan pertama. Rayuan ini adalah hanya terhadap kuantum yang diawardkan berkaitan empat butiran ganti rugi: (a) RM100,000 untuk kecederaan teruk di kepala; (b) RM28,000 untuk neuropati optic trauma; (c) RM8,000 untuk parut; dan (d) RM96,000 untuk kehilangan pendapatan.

Diputuskan, menambah award untuk kecederaan teruk di kepala kepada RM140,000 dan mengesahkan award lain yang diberikan oleh mahkamah perbicaraan:

(1) Award untuk kecederaan teruk di kepala telah ditambah kepada RM140,000 untuk bersesuaian dengan keadaan semasa plaintif dan bergantung kepada ringkasan award-award kecederaan peribadi bertarikh 17 April 2014. Mahkamah lebih bergantung kepada laporan pakar defendan bertarikh 19 Jun 2015 kerana ia telah dibuat kemudian daripada laporan plaintif dan lebih baik untuk menunjukkan keadaan

terkini plaintif. Mahkamah juga memberi perhatian untuk melihat dahulu keadaan terkini plaintif apabila rayuan didengar pada 9 Disember 2016. Plaintif telah meminta sejumlah RM400,000 tetapi makamah berpendapat jumlah tersebut adalah untuk keadaan di mana plaintif lumpuh dan terlantar sepenuhnya di mana ia tidak berlaku di sini (lihat perenggan 8–9).

(2) Berdasarkan ringkasan yang disemak semula berhubung award-award kecederaan peribadi bertarikh 17 April 2014, award untuk buta sepenuhnya di satu mata adalah RM80,000; justeru jumlah RM80,000 yang dipohon oleh plaintif untuk neuropati optic traumatic adalah melampau. Award mahkamah sesyen untuk kepala, ganti rugi ini, dan juga untuk parut, tidak terlampau atau ternyata begitu rendah; justeru award-award tersebut tidak diganggu (lihat perenggan 11–12 & 15).

(3) Mahkamah sesyen telah mengawardkan plaintif RM500 setiap bulan atas pengganda 16 tahun untuk memberikan sejumlah RM96,000 untuk kehilangan pendapatan. Berdasarkan fakta itu, award tersebut paling munasabah. Ia tidak begitu rendah kerana tuntutan tidak disokong oleh apa-apa keterangan dokumentar dan skongan mana-manaa saksi dengan hanya bergantung kepada keterangan bapa plaintif. Atas fakta itu, ia tidak mungkin untuk plaintif memperoleh sepertimana yang diterangakan semasa perbicaraan. Award mahkamah sesyen dengan itu tidak diganggu. Tuntutan seperti ini menghendaki bukti kukuh. Mahkamah-mahkamah majistret dan sesyen terutamanya — di mana kebanyakan hal kemalangan dilitigasi — patut memberi amaran kepada diri sendiri kerana terlalu berlembut dengan tuntutan yang melibatkan pendapatan dan patut menuntut bukti dokumentar yang mencukupi. Penghasilan keterangan yang sedikit dan semata-mata keterangan lisan tanpa apa-apa bentuk sokongan tidak patut dilayan semudahnya. Ia adalah tanggungjawab mahkamah untuk meminta pihak-pihak mematuhi peraturan bukti kukuh dan mahkamah tidak patut begitu mudah diyakini, terutamanya oleh elemen simpati, untuk memberi award yang tidak kukuh untuk kehilangan pendapatan (lihat perenggan 19–21).]

Notes

For cases on appeal against awards made, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 463–468.

Cases referred to

Basiron bin Mustafa v Ema Ukhtiah binti Zakaria (2015) 2 PIR 30 (refd)
Leng Yang Sua & Anor v Ng Yen Kee & Anor [1986] CLJ Rep 448, HC (refd)
Muhammad Nasir bin Khalid v Tan Ah Kaw (2015) 2 PIR 60 (refd)
Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463, CA (refd)

Tan Cheong Poh & Anor v Teoh Ah Keow [1995] 3 MLJ 89, CA (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
United Plywood and Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, FC (refd)

Shuruma Gunathakurta (Manjit & Co) for the appellant.
Hema Malini (K Suganthy & Co) for the respondents.

Azmi Abdullah JC:

INTRODUCTION

[1] The appeal before this court is by the appellant ('the plaintiff') against the decision of the learned sessions judge on the issue of quantum made on 20 May 2016. The award was pursuant of an accident that occurred between the plaintiff astride motorcycle No PGM 5416 and another motorcycle ridden by the first defendant on 28 December 2012. The issue of liability has been agreed as the parties being equally liable (50:50).

[2] The awards on quantum based on 100 % liability were:

General damages:

(a) RM100,000 for the severe head injury;

(b) RM30,000 for the facial fracture;

(c) RM3,000 for laceration;

(d) RM3,000 for haematoma;

(e) RM10,000 for bilateral pneumothorax;

(f) RM28,000 for traumatic optic neuropathy — eye;

(g) RM10,000 for right ear decreased hearing;

(h) RM8,000 for scars; and

(i) RM8,000 for aspiration pneumonia.

Special damages:

(j) RM96,000 for loss of earnings; and

(k) RM402,900 for nursing care.

[3] The appeal on quantum is against the awards for items (a), (f), (h) and (j) only.

[4] The appellant (plaintiff) being dissatisfied with the findings of this court which increased the award only for item (a) — severe head injury, then filed a notice of appeal to the Court of Appeal hence these grounds for decision.

PRINCIPLES OF LAW

[5] In coming to its decision this court has considered the principles laid down in these cases:

(a) in *Topaiwah v Salleh* [1968] 1 MLJ 284 wherein it was held by the Federal Court that:

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that *the judge acted on some wrong principle of law*, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the Federal Court will follow in the light of the special facts of each particular case.

(b) in the case of *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 it was decided by the Federal Court:

> An appellate court can only interfere with an assessment if it is considered *inordinately low or inordinately high* or if it is so much out of line with the discernible pattern of awards in reasonably comparable case that it might be regarded as a wholly erroneous estimate.

(c) the case of *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463 laid down that:

> *An appellate court would be reluctant to disturb the primary exercise of discretion. This is because a court of appeal in a matter such as the present does not possess an original discretion, its initial function being one of review only*. However, where, as in the present instance, it is amply demonstrated that the judge in whom the primary discretion is vested has failed to take into account relevant considerations, it is the duty of the appellate court to say so and to intervene and set matters right by an exercise of its own discretion.

ISSUES CONSIDERED

General damages

Severe head injury

[6] These are the specialist reports on the head injury of the plaintiff upon being referred by the plaintiff solicitor:

(a) Bagan Specialist Centre Sdn Bhd dated 6 January 2014;

(b) Gleneagles report dated 30 October 2014; and

(c) from Columbia Asia dated 24 December 2013.

The defendant solicitor relies on these reports prepared by the specialist of their choice:

(a) Brain Science Neurosurgery Specialist Clinic dated 19 June 2015; and

(b) Hospital Lam Wah Ee dated 31 October 2014.

[7] This court relies more on the defendant's specialist reports especially the lengthy report dated 19 June 2015 at pp 15–24 of the said report, as looking at the timeline they are made latter than the plaintiff's reports and would better indicate the more current condition of the plaintiff. *This court made a point to have a first hand look at the current condition of the plaintiff who was present in court when the appeal was heard on 9 December 2016.*

[8] There is certainly no doubt that the plaintiff suffers very serious conditions but at the same time he has improved substantially in the period of about two years since the accident occurred. The plaintiff solicitor submitted that RM400,000 should be awarded, a figure that this court finds excessive whilst the defendant solicitor countered with a figure of RM80,000. The learned sessions court judge made an award of RM100,000.

[9] This court is of the view that the sum of RM400,000 would be for situations whereby the plaintiff is quadriplegic and entirely bedridden which is not the case here. *This court however exercises its appellate jurisdiction to increase the award for this particular injury to RM140,000 which commensurates with the present prevalent condition of the plaintiff.* Reliance is placed on the Compendium of Personal Injury Awards dated 17 April 2014 that is reproduced below in coming to this decision:

Injury	Low	High
Cerebral concussion/loss of consciousness	5,500	
Subdural haematoma with burr hole craniotomy	16,500	27,500
Mild personality or behavioural changes	22,000	44,000
Memory impairment	22,000	49,000

Injury	Low	High
Intellectual impairment	55,000	165,000
Motor impairment (weakness of limbs) hemiplegia	*44,000*	*71,500*
Bedridden state with awareness	275,000	385,000
Persistent vegetative state (coma)	165,000	220,000

Traumatic optic neuropathy — Eye

[10] There are these reports to consider in determining the condition of the plaintiff:

(a) Kumar Eye Specialist Centre dated 14 December 2015; and

(b) Oh Eye Clinic & Surgery dated 4 March 2016.

[11] The defendant's specialist report dated 4 March 2016 which is more current reports states that there is a 35% vision loss of the left eye. The plaintiff solicitor submits the sum of RM80,000 whilst the award made by the learned sessions court judge is RM28,000.

[12] Based again on the Revised Compendium of Personal Injury Awards dated 17 April 2014 reproduced below, the award of total blindness in one eye is RM80,000 hence this court finds that the submitted figure is excessive. This court finds that the award of RM28,000 made by the learned sessions court judge is not manifestly or inordinately low. This court hereby does not disturb the award made by the learned sessions court judge:

Injury	Low	High
Haematoma	2,500	3,500
Loss of peripheral vision	11,000	22,000
Diplopia (double vision)	11,000	22,000
Traumatic cataract	5,500	8,500
20%–50% loss of vision in one eye	22,000	33,000
20%–50% loss of vision in both eyes	38,500	77,000
50%–80% loss of vision one eye	27,500	66,000

Injury	Low	High
50%–80% loss of vision in both eyes	55,000	132,000
Blindness in one eye	*77,000*	*82,500*
Blindness in both eyes	192,500	198,000
Loss of eye	88,000	93,500
Loss of both eyes	198,000	209,000

Scars

[13] They are:

(a) tracheostomy scar 2 cm with 3 mm fistula;

(b) two scars for chest tube;

(c) 6 cm x 6 cm on sacral area;

(d) 1 cm over the occiput;

(e) bed/pressure sores; and

(f) 1 cm over right forehead.

[14] The plaintiff submits RM25,000 should be the appropriate award with the defendant solicitor submitting the figure of RM4,000. The award made by the learned sessions court judge is RM8,000.

[15] The case of *Basiron bin Mustafa v Ema Ukhtiah binti Zakaria* (2015) 2 PIR 30 awards RM3,000 for more severe scars whilst the case of *Muhammad Nasir bin Khalid v Tan Ah Kaw* (2015) 2 PIR 60 awards RM4,000 for far more severe scarring than this instant case. This court finds that the award granted by the learned sessions court judge is again not manifestly or inordinately low and shall not disturb the award made.

Special damages

[16] For this claim, the plaintiff claims the sum of RM1,500 per month at the multiplier of 16 years adding up to RM288,000. The defendant however submitted that the award should be on the basis of RM200 per month for 16 years totalling RM38,400. The learned sessions court judge meanwhile awarded the plaintiff RM500 per month with the total award on the basis of 16 years multiplier being RM96,000.

[17] This court has taken into consideration the case of *Leng Yang Sua & Anor v Ng Yen Kee & Anor* [1986] CLJ Rep 448 before deciding:

A claim for special damages must be strictly proved. Where the best evidence available has been produced, the court will do the best it can to make some award. *But where evidence is or ought to be available and is not produced, the court should be not be left to speculate what would be an appropriate sum to award*. Since the first plaintiff did not keep accounts of his purchases and sales, his profits or wages paid to his employees and his tax returns, no award was made for loss of earnings.

[18] In this case the facts are as below:

(a) the father of the plaintiff is his employer;

(b) the workplace is a part of the house occupied by the plaintiff and his father;

(c) no documentary evidence was produced as regards the employment of the plaintiff;

(d) no evidence pertaining to the income of the motorcycle repair shop was produced;

(e) the plaintiff did not produce any documents especially income tax returns nor bills and receipts issued to customers;

(f) the plaintiff did not call any witness especially the brother of the plaintiff who was working together with the plaintiff to give evidence pertaining to the income of the repair shop;

(g) the father gave wages of RM1,500 each to the plaintiff and his brother from the income of the repair shop;

(h) the plaintiff's father testified that his income was RM5,000 per month but admittedly the same is not a fixed figure; and

(i) the plaintiff was responsible for a household of six persons including himself and the plaintiff as well as the other brother working for him.

[19] The learned sessions court judge warned himself that the *father is a person of interest* in this claim and due to the lack of tangible evidence made an award of RM500 per month for a duration of 16 years totalling RM96,000.

[20] *This court is of the view that claims such as this should require strict proof. The courts especially at the magistrate and sessions court level where most of the accident matters are litigated should warn itself from being too lenient in dictating that claims involving earnings would require adequate documentary proof and should not shy away from demanding as such. The production of minimal evidence and purely oral evidence without any form of corroboration should not be easily entertained. It is the responsibility of the courts to ask parties to adhere closely to the strict proof rule and the courts should not be too readily persuaded especially by the element of sympathy to give unsubstantiated awards for earnings loss.*

[21] Given the facts available this court finds that the award is most reasonable given the facts prevalent. The award made is not manifestly low given the fact that the claim is unsupported by any documentary evidence and corroboration by any witness with only the evidence of SP4 (the father) to rely on. Given the facts surrounding this claim, it is highly unlikely that the plaintiff was earning as evidenced during the hearing. The award by the sessions court judge is hereby not disturbed.

CONCLUSION

[22] This court in deciding this appeal is mindful that the appellate court should not give preference to its own figure simply because it disagrees with the figure arrived at by the trial judge as decided in the case of *Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89 wherein it was held by the Court of Appeal and quoted that:

> *It is trite that the appellate court should not give preference to its own figure simply because they disagree with the figure arrived at by the trial judge*; it will only interfere if it is satisfied that the judge has acted on a wrong principle of law or has for other reasons made a wholly erroneous estimate of the damage suffered.

[23] This court hereby allows the appeal for quantum only for the severe head injury with the other awards made by the learned sessions court judge not being disturbed. Each side is to bear its own costs.

The award for severe head injury increased to RM140,000 and the other awards granted by the trial court affirmed.

Reported by Ashok Kumar